IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 386

JOHN W. JOHNSON, Superintendent of Public Works of the State of New York, *Appellant,*

v.

TUSCARORA NATION OF INDIANS also known as TUSCARORA INDIAN NATION, *Appellee.*

On Appeal from the United States Court of Appeals for the Second Circuit

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SUGGESTION OF MOOTNESS AND MOTIONS TO AFFIRM AND/OR DISMISS

Appellee in the above-entitled case moves to affirm and/or dismiss the portion of the judgment appealed from on the grounds that (1) both questions presented have become moot insofar as the appellant is concerned by virtue of subsequent litigation, (2) the questions presented by the appeal are so unsubstantial as not to

need further argument, and (3) the second question presented is not within the appeal jurisdiction of this Court.

STATEMENT

Appellee, the Tuscarora Nation of Indians, is a recognized tribe of American Indians owning and occupy a reservation of 6,249 acres in Niagara County, New York. Approximately 1,000 acres of that reservation are included in the proposed reservoir area of the hydroelectric facilities known as the Niagara Project. A license for the construction and operation of the Niagara Project was issued on January 30, 1958, to the Power Authority of the State of New York after a hearing and decision by the Federal Power Commission. The validity of that license has been contested by the appellee, a matter which is presently pending before the United States Court of Appeals for the District of Columbia Circuit. *Tuscarora Indian Nation* v. *Federal Power Commission,* No. 14,475.

The instant case had its direct origin in the action of the Power Authority of the State of New York in seeking to implement its Federal Power Commission license. Purportedly acting "pursuant to Article 5, Title 1 of the Public Authorities Law and the applicable provisions of Section 30 of the Highway Law" of New York, the Power Authority sought to appropriate some 1,383 acres of land in the Tuscarora Reservation for use as a storage reservoir. In accordance with the procedures established by the aforementioned Public Authorities Law and the Highway Law, the following procedural events took place:

1. On February 17, 1958, the trustees of the Power Authority determined that acquisition of the Tuscarora land was required for public use in connection with the Niagara power project.

2. On March 21, 1958, the Power Authority filed a petition for a judgment of condemnation of the Tuscarora land in the Supreme Court of New York, Niagara County. The authority for the condemnation was said to be the Public Authorities Law.

3. On April 11, 1958, an amendment to the Public Authorities Law became effective whereby express authority was purported to be given to the Power Authority to utilize the appropriation procedure of the Highway Law to acquire real property for the improvement and development of the Niagara River.

4. The Power Authority thereupon completely abandoned the previously instituted condemnation case in the state court and invoked the appropriation procedure of the Highway Law by requesting the appellant, as Superintendent of Public Works, to acquire the land in the name of the State.

5. Pursuant to Section 30 of the Highway Law, the appellant took a map supplied to him by the Power Authority and filed it on April 14, 1958, in the Office of the Secretary of the State and on the following day he filed an additional copy in the Office of the County Clerk of Niagara County. The filing of the map in the latter office made the appropriation complete and purported to vest title to the property in the people of the State of New York.[1] The appellant's functions in this procedure were entirely ministerial.

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[1] Par. 7 of Sec. 30 of the New York State Highway Law, quoted at p. 69 of Jurisdictional Statement, Appendix C.

Agents of the Power Authority made immediate attempts to enter upon and take possession of the land thus "appropriated".

Because of the obvious and imminent threat to its lands, appellee filed a complaint in the United States District Court for the Southern District of New York. This complaint sought a declaratory judgment to the effect that the Power Authority had no right to acquire lands of the appellee without the express consent of the United States and a permanent injunction prohibiting the Power Authority and the appellant from acquiring or attempting to acquire lands belonging to the appellee in the absence of such consent. The appellant was made a party to the proceeding solely because of his ministerial functions in accepting and filing the map of the power project, as outlined above.

The District Court for the Western District of New York, following the transfer of the case to that court,[2] denied the motion for a permanent injunction and dismissed the complaint.[3] The Court of Appeals for the Second Circuit, however, reversed the District Court insofar as it had dismissed the complaint and thereby had blocked the appellee from any relief by way of a declaration of rights.[4] The court held that the Federal Government, by virtue of 25 U.S.C. §§ 177 and 233, had retained paramount authority to control the alienation of Indian tribal lands in New

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[2] The case was removed from the District Court for the Southern District of New York pursuant to 28 U.S.C. §§ 1392(b) and 1406(a). *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 161 F. Supp. 702 (S.D.N.Y., 1958).

[3] The opinion of that court appears at p. 35 of the Jurisdictional Statement, Appendix B.

[4] The opinion of the Court of Appeals appears at p. 14 of the Jurisdictional Statement, Appendix A.

York and that the state could not acquire those lands without the express consent of the United States. The court further found that the Congressional consent with respect to the taking of the Tuscarora land was to be found in the direction given by Congress to issue a license to the Power Authority (71 Stat. 401) and in the vesting in licensees of the governmental power of eminent domain (Sec. 21 of the Federal Power Act, 16 U.S.C. § 814).

The Court of Appeals then made two critical rulings which must be considered separately and apart from each other:

(1) The court ruled that Congress had not authorized the taking of Indian lands pursuant to the eminent domain procedures of the Highway Law and the Public Authorities Law of New York. Hence the proceedings under those statutes were vacated and annulled.

(2) The court also ruled that the only appropriate method of taking appellee's land was by condemnation proceedings in either a state or federal court. The court then requested that the federal district court, should the Power Authority elect to exercise its right of eminent domain in that court, "expedite all proceedings as much as possible."[5]

Pursuant to the second ruling, the Power Authority completely abandoned the appropriation proceedings under the state statutes and elected to institute an en-

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[5] This second ruling was the subject of the petition for certiorari filed by the appellee in No. 384, October Term, 1958, *Tuscarora Nation of Indians* v. *Power Authority of the State of New York, et al.* The petition was denied on October 13, 1958. The appellant Johnson was named a respondent in that petition solely because he had been a party to the proceedings before the Court of Appeals in his ministerial capacity.

tirely new condemnation case in the federal district court. *Power Authority of the State of New York* v. *1383.55 Acres of Land, etc.* (Civil Action No. 7934, W. D. N. Y.). The appellant Johnson, however, is not a party to, and is in no way affected by, this new and still pending condemnation proceeding.

SUGGESTION OF MOOTNESS

The questions which the appellant Johnson seeks to raise on this appeal are twofold:

1. Whether the exercise of New York's sovereign power of eminent domain as to Indian reservations is repugnant to the federal statutes establishing the supremacy of the United States over such reservations, 25 U.S.C. §§ 177 and 233; and

2. Whether the acquisition of title to appellee's lands by state eminent domain procedures set forth in the New York Highway Law and the New York Public Authorities Law is repugnant to Section 21 of the Federal Power Act, 16 U.S.C. § 814.

Both of these questions necessarily relate to the abandoned effort by the Power Authority to utilize the eminent domain procedures set forth in the two New York statutes. As has been stated by the Power Authority in its brief in opposition to certiorari in No. 384, Oct. Term 1958, before this Court (pp. 31-32):

> "In taking steps to acquire petitioner's [appellee's] land in the name of the State by appropriation, Johnson acted strictly in a ministerial capacity and his sole purpose was to make the land available to the Power Authority which needed it for its Niagara Power Project and will have to pay for it.

> "The Authority has abandoned efforts to obtain possession of the land by appropriation [pursuant to the Highway Law and the Public Authorities Law of New York], has already acquired possesion of part of it for transmission lines in the condemnation proceeding it brought in the District Court for the Western District of New York and is perfectly content to acquire the balance in that proceeding."

It is thus apparent that there is no occasion for this Court to pass upon questions which have relevance only to state statutory proceedings which have been abandoned. The appellant Johnson had at most a ministerial function in those proceedings and he is without power or interest to reinstitute or prosecute such proceedings without the cooperation of the Power Authority. He has no standing to complain of the abandonment of those proceedings. And he likewise has no standing to request that this Court issue an advisory opinion on the questions presented for use in possible future attempts by the Power Authority or others seeking to utilize the state statutory eminent domain procedures.

In other words, the appellant is now seeking to invoke the appeal jurisdiction of this Court on abstract questions of power as between New York and the United States without any showing of a *current or continuing* prejudicial injury to the proprietary rights of New York or its rights of physical dominion. This he may not do. *Massachusetts* v. *Mellon,* 262 U.S. 447, 480-485 (1923); *New Jersey* v. *Sargent,* 269 U.S. 328 (1926); *Texas* v. *Interstate Commerce Commission,* 258 U.S. 158 (1922).

For these reasons, appellee suggests that the issues sought to be raised are moot as to the appellant Johnson and that the appeal should be dismissed on that ground.

MOTION TO AFFIRM

Appellee moves to affirm the portion of the judgment below sought to be reviewed on the ground that the questions presented are so unsubstantial as not to need further argument.

Both federal and state courts consistently have ruled that the United States possesses paramount power to control and govern the territory reserved and held by Indians, including tribal lands in the State of New York. *Worcester* v. *Georgia,* 6 Pet. (U.S.) 515 (1832); *The Kansas Indians,* 5 Wall. (U.S.) 737 (1867); *United States* v. *Candelaria,* 271 U.S. 432 (1926); *Board of County Commissioners* v. *Seber,* 318 U.S. 705 (1943); *United States* v. *Forness,* 125 F. 2d 928 (C.A. 2, 1942); *People ex rel. Cusick* v. *Daly,* 212 N.Y. 183 (1914).

The courts also have held uniformly that the Federal Government occupies a special position as the guardian and protector of Indian tribes, including those resident in the State of New York. *United States* v. *Kagama,* 118 U.S. 375 (1886); *People ex rel. Cusick* v. *Daly, supra; Mulkins* v. *Snow,* 232 N.Y. 47 (1921); *Patterson* v. *Seneca Nation,* 245 N.Y. 433 (1927). Only Congress can determine when that fiduciary relationship shall cease. *Winton* v. *Amos,* 255 U.S. 373 (1921).

The conveyancing or alienation of Indian land still remains within the sphere of superior federal power and control, even though certain elements of jurisdic-

tion have been transferred from the United States to the State of New York.[6] After thoroughly reviewing the pertinent statutes (25 U.S.C. §§ 177 and 233) and court decisions, the Court of Appeals below properly concluded (Jurisdictional Statement, p. 26) that "Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has by the enactment of the express reservation concerning land interests of the Indian tribes in New York in Title 25 U.S.C.A. § 233, pointed up and reaffirmed its paramount authority over Indian tribal lands."

Appellant cites no case in this Court which in any way casts doubt on the correctness of that conclusion or on the continuing validity of the federal supremacy principle Indeed, so well settled is that principle that any attempt like the instant one to question it falls into the category of unsubstantiality not meriting further argument. For that reason alone, the portion of the judgment below appealed from should be affirmed.

MOTION TO DISMISS

Appellee moves to dismiss the appeal insofar as the second question presented is concerned since that question is not within the appeal jurisdiction of this Court as invoked by the appellant.

The jurisdiction invoked by the appellant is that contained in 28 U.S.C. § 1254(2), which refers to appeals "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Con-

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[6] Precisely this conclusion is reached in Report No. 1 of the Inter-Law School Committee, State of New York Special Legislative Committee on the Revision and Simplification of the Constitution, N.Y. Leg. Doc. No. 57 (May, 1958), pp. 38-39.

stitution, treaties or laws of the United States." This means that the decision of the Court of Appeals below, as to which the appeal relates, must be based squarely on a finding that a state statute relied upon by the appellant is contrary or repugant in its operation and effect to federal law. *Public Service Commission* v. *Batesville Telephone Co.,* 284 U.S. 6 (1931). The second question of the instant appeal does not meet the requirements of this appeal jurisdiction.

The court below made no finding, to use the language of the second question presented by the Jurisdictional Statement (p. 3), that "acquisition of title by eminent domain under the procedure set forth in New York Public Authorities Law, Art. 5, Tit. 1 § 1007 and New York Highway Law, § 30 [is] repugnant to 16 U.S. Code § 814 (Federal Power Act § 21)." The court simply held, *as a matter of construction of Section 21 of the Federal Power Act,* that Congress had not chosen the procedure set forth in the two New York statutes as a means of eviction pursuant to the federal eminent domain power. In the words of the court, "If Congress had intended this procedure to be followed, section 814 instead of providing 'in the state courts' would have read 'or in such manner as may be prescribed by the legislature of the state in which the property is located.' . . . If Congress wishes this to be the method of eviction it should at least so declare in specific terms." (Jurisdictional Statement, p. 32).

Thus the court below did nothing more than construe Section 21 of the Federal Power Act and conclude that Congress had not therein chosen to utilize the state procedure here involved. Such a holding is not tantamount to finding the state procedure or its underlying state statutes repugnant or contrary to federal law. It

is simply a matter of construction of a federal statute. And such a matter does not rise to the status of an appealable issue under 28 U.S.C. § 1254(2). See *Quong Ham Wah Co.* v. *Industrial Accident Commission,* 255 U.S. 445, 448 (1921); *Ross* v. *Oregon,* 227 U.S. 150, 161-2 (1913).

The appeal in this respect must therefore be dismissed. Moreover, this Court has no authority under 28 U.S.C. § 1254(2) to treat the appeal papers as a petition for certiorari where the appeal is improvidently taken, as this one is.

CONCLUSION

For the foregoing reasons, appellee moves to dismiss the appeal and/or affirm the portion of the judgment below to which appellant objects.

Respectfully submitted,

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